Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

DARWIN MONTANA,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a defendant's Sixth Amendment right to conflict free representation was denied when his counsel provided evidence to the prosecution which was adverse to defendant in order to protect trial counsel's own interest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Darwin Montana, prays for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for The Seventh Circuit with a timely petition for rehearing being denied on January 18, 2000.

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, *United States v. Montana*, 19 F. Supp. 2d 873 (N.D. Ill. 1999), and the opinion of the United States Court of Appeals for the Seventh Circuit, *United States v. Montana*, 199 F.3d 947 (7th Cir. 1999), are reproduced in appendices A and B, respectfully of this petition.

Petitioner petitioned the United States Court of Appeals for the Seventh Circuit for rehearing and petitioned for rehearing *en banc*. The petitions were denied on January 18, 2000. A copy of that order is reproduced in Appendix C of this petition.

STATEMENT OF JURISDICTION

The opinion and order of the United States Court of Appeals for the Seventh Circuit was entered on December 16, 1999. A petition for rehearing and a petition for rehearing *en banc* were denied on January 18, 2000. This petition for a Writ of Certiorari is filed within 90 days of that order as required by Rule 13(1) of the Rules of this Court. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states the following:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On March 5, 1998, a federal grand jury sitting in the Northern District of Illinois, Eastern Division, returned a three court indictment charging James E. Dodd (hereinafter "Dodd") and Petitioner Montana with violating the following federal statutes: Title 18, United States Code, Section 371, conspiracy to commit bank robbery; Title 18, United States Code, Section 2113(a), Title 18, United States Code, Section 2, bank robbery and/or aiding and abetting a bank robbery; and Title 18, United States Code, Section 924(c), use of a firearm in a crime of violence specifically, the bank robbery. R. 1, Tr. Vol. 1, p. 270, 277, 279-284.[1]

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[1] Citations to the record in this petition are designed as R. ___. Citations to the transcript of trial and other proceedings are designated as Tr. Vol. ___, p. ___. Citations to the supplemental record are designated as S. ___.

Petitioner Montana's jury trial began on June 8, 1998. Tr. Vol. 1, p. 4. On June 11, 1998, the jury returned a verdict of not guilty as to count one and guilty as to counts two and three. R. 34, Tr. Vol. 4, p. 312. Petitioner filed post trial motions on June 25, 1998 and supplemented those post trial motions on August 31, 1998. R. 40 and 47. The district court denied these motions in a written opinion on September 11, 1998. R. 50-51. On March 16, 1999, Petitioner was sentenced to a term of two hundred and sixty-two (262) months of incarceration in the custody of the United Stated Bureau of Prisons to be followed by sixty (60) months of incarceration in the custody of the United States Bureau of Prisons. Therefore, the total period of incarceration is three hundred and twenty-two (322) months. The period of incarceration is to be followed by three years of supervised release.

The federal district court had jurisdiction over the case pursuant Title 18, United States Code, Section 3231 and the federal court of appeals had jurisdiction pursuant to Title 28, United States Code, Section 1291.

At trial the following evidence was placed before the jury:

On January 22, 1998, Dodd entered and robbed the Superior Bank, 4001 South Harlem, Stickney, Illinois. Dodd approached a teller, Deborah Schaer, at her teller window and pointed a handgun at her. Dodd then told the teller to give him all of the 100's and 50's. The teller gave Dodd some money. Dodd then demanded that the teller give him the "stacks." The teller gave Dodd additional money, including "bait bills." The teller gave Dodd $2,369.00. After taking the money, Dodd left the bank. (Tr. Vol. 1, p. 20-22, 26-27, 28-31, 41).

Dodd walked out of the bank, walked across the street and entered the parking lot of a nearby Jewel-Osco store. Dodd then entered a car driven by Petitioner Montana. (Tr. Vol. 1, p. 28, 47, 51). A witness saw the car and information regarding the car was ultimately communicated to the Village of Stickney Police Department. (Tr. Vol. 1, p. 28, 58). Approximately five blocks from the bank, a Stickney police officer observed the getaway car and attempted to stop it by turning on the police flashers. (Tr. Vol. 1, p. 59-61). The car then fled. The police officers engaged in a high-speed chase of the car at times reaching speeds of 65 miles per hours through various neighborhoods. Eventually, the car crashed into a porch of a home. (Tr. Vol. 1, p. 61-63). Police officers approached the car. The officers arrested the driver, Petitioner Montana. (Tr. Vol. 1, p. 64). On the rear floor of the back seat of the car, the officers found Dodd and arrested him. On the rear floor of the back of the car, directly behind the driver's seat, the officers recovered the gun Dodd used to rob the bank. Also recovered on the rear floor of the back seat was a black leather jacket. Inside the left interior pocket of the jacket was $2,360.00 in cash. Five of the bills were bait bills from the Superior Bank. Also inside the leather jacket was an envelope containing paperwork, including a birth certificate for James Dodd. (Tr. Vol. 1, p. 72-80, 87-88, Vol. 2, p. 103-106). After his arrest, Petitioner Montana was transported to the Dirksen Federal Building. Petitioner Montana stated that he was in the Jewel-Osco parking lot with the hood up on the car and that he was approached by two men whom he did not know. One of the men pointed a gun at him and forced him to get into his vehicle and drive away. (Tr. Vol. 2, p. 145-147). Petitioner Montana admitted that he drove

Dodd over to the Jewel-Osco parking lot. Petitioner Montana said that his car was starting to malfunction so he pulled over into the Jewel lot and popped the hood. Dodd left and then returned, telling Petitioner Montana to drive away. Petitioner Montana drove the car and Dodd rode in the back seat. Petitioner Montana said that he asked Dodd what was wrong. Petitioner Montana said he wanted to pull over, but Dodd told him not to stop. (Tr. Vol. 2, p. 145-149). Dodd testified that Petitioner Montana was innocent of the charged offenses. (Tr. Vol. 2, p. 182-191).

After the government and defense had rested, the government sought to reopen its case. (Tr. Vol. 2, p. 153-155, Tr. Vol. 3, p. 228-230). Over Petitioner Montana's objection, one of the deputy United States Marshal providing courtroom security testified that at approximately 10:00 a.m. on the previous day, he heard Dodd make a statement while Mr. Dodd was in the United States Marshal's lockup and while Dodd was in the general area of defendant Montana's cell as follows: "Let him know its going to be $10,000.00 and he had said let—either, let your father know or let him know that its going to be $10,000.00." This testimony was followed by a stipulation in which trial counsel for Petitioner Montana stipulated that James Dodd passed a note to Petitioner Montana's mother on the second day of trial. (Tr. Vol. 3, p. 237-239). Unbeknownst to the Petitioner, Petitioner's counsel had informed the government of the existence of the note, had informed the government, that he, Petitioner's counsel, had passed the note from Dodd to Petitioner's mother and Petitioner's counsel had informed the government of the alleged contents of the note. Further, unbeknownst

to Petitioner, Petitioner's counsel called the trial court judge at home and had a conversation outside the presence of a court reporter regarding the fact that Petitioner's counsel had conveyed the note from Dodd to Mrs. Montana. (Tr. Vol. 2, p. 232-233).

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Seventh Circuit is in conflict with decisions of the United States Courts of Appeals for the Eleventh and Second Circuits.

Petitioner contended on appeal to the Court of Appeals that the fact that Petitioner's trial counsel involved himself, unbeknownst to Petitioner, in an alleged scheme to bribe a witness and then revealed what he, trial counsel, had done to the prosecutors and to the trial judge by calling the trial judge at home established a conflict of interest with trial counsel's representation of Petitioner. The situation was further exacerbated by the fact the prosecution put before the jury evidence regarding the note which the prosecution had learned from Petitioner's trial counsel. Obviously, trial counsel was protecting his own interest by cooperating with the authorities to demonstrate his, trial counsel's, lack of knowing involvement in an alleged bribery scheme. The United States Court of Appeals for the Seventh Circuit stated in reliance on its previous decisions that "[t]he mere fact of being under investigation by the prosecutors of the lawyer's client does not create a fatal conflict, we have held" (citations omitted). The Court of Appeals for the Seventh Circuit indicated that the only decision contrary to the Seventh

Circuit's position was the Eleventh Circuit's decision in *United States v. McLain*, 823 F.2d 1457, 1464 (11th Cir. 1987). However, the Seventh Circuit Court of Appeals went on to state that the Eleventh Circuit's decision in *McLain* was rendered "defunct" by a subsequent Eleventh Circuit decision in *United States v. Watson*, 866 F.2d 381, 385 n. 3 (11th Cir. 1989).

An examination of *McLain* indicates that the Eleventh Circuit clearly held that where a client's attorney is under investigation by the same prosecutor who is prosecuting the client, there is a fatal conflict of interest. *McLain* at 1464. The Eleventh Circuit did not in *Watson* indicate that the *McLain* conflict principal was in any way "definct". In fact, the *McLain* conflict principal was reaffirmed by the Eleventh Circuit Court of Appeals in *United States v. Register*, 182 F.3d 820, 823 (11th Cir. 1999) and adopted by the Second Circuit Court of Appeals in *United States v. Fulton*, 5 F.3d 605, 609 (2nd Cir. 1993). Therefore, the position of the Seventh Circuit Court of Appeals is contrary to two other federal courts of appeals.

The implication of this conflict is the following: In the Second and Eleventh Circuits, once a defendant establishes that an attorney has an actual conflict of interest such as the conflict between Petitioner and his trial counsel, and there is no waiver or consent, the prejudice requirement of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is presumed. In the Seventh Circuit Court of Appeals, the fact that a client's attorney has allegedly involved himself in a bribery scheme and has attempted to exonerate himself at the expense of his client by providing information ad-

verse to the client to the prosecutor who is prosecuting his client, is not a situation presenting a fatal conflict of interest. The rule enunciated by the Seventh Circuit Court of Appeals has created a conflict among the Circuit Courts of Appeals and is in conflict with this court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully prays that this Honorable Court grant the instant petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A"

[Dated September 4, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	No. 98 CR 54
	)	
	)	
DARWIN MONTANA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On June 11, 1998 the jury in this criminal case found Darwin Montana ("Montana") not guilty on Count One and guilty on Counts Two or Three of the three-count indictment.[1] After defense counsel Luis Galvan ("Galvan") had filed motions for a judgment of acquittal and for a new trial, new counsel Phillip A. Turner ("Turner") entered an appearance for Montana in substitution for Galvan, was granted additional time to file supplemental post-trial motions and has now filed a supplemental motion for new trial. For the reasons stated in this memorandum opinion and order, all motions filed on Montana's behalf are denied.

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[1] Codefendant James Dodd ("Dodd") entered a guilty plea on the morning of trial and was later called as a witness on Montana's behalf.

Motion for Judgment of Acquittal

Before being replaced by Turner, trial attorney Galvan moved under Fed. R. Crim. P. ("Rule") 29 that the jury verdict on Counts Two and Three be set aside in favor of a judgment of acquittal. But the motion correctly concedes that the high hurdle that defense counsel must surmount for that purpose is to demonstrate that the evidence taken in the light most favorable to the prosecution failed to prove Montana's guilt beyond a reasonable doubt—indeed, as reconfirmed in such cases as *United States v. Sax*, 39 F.3d 1380, 1395 (7th Cir. 1994), a conviction is to be reversed "only if no rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt." Montana plainly fails to meet that test.

If anything about the outcome of the trial was surprising in light of the evidence, it was not Montana's conviction on Count Two or Count Three, but rather his acquittal on Count One. Any possible inconsistency within the verdict would not of course be a ground for relief (see, e.g., *United States v. Sims*, 144 F.3d 1082, 1083-84 (7th Cir. 1998), adhering to the definitive pronouncement in *United States v. Powell*, 469 U.S. 57, 64-65 (1984)). And in the instance, not only was there no necessary inconsistency in the jury's determinations but—more importantly—the proof of Montana's guilt as to both Counts Two and Three was overwhelming.

It was conceivable for the jury (even though a not guilty verdict on Count One would most likely be considered to have been against the manifest weight of the evidence if this were a civil case) to credit the story, as told by Dodd, that Montana had repeatedly urged Dodd

not to carry out his announced plans to rob a bank. That in turn was the only real linchpin in the evidence for a conclusion that, until the robbery was actually committed, Montana was unaware of Dodd's intentions to rob the bank on the day of the event—thus supporting the jury's determination that Montana should be acquitted on the Count One conspiracy charge. But even on that premise, it was surely in order for the jury also to determine that all the circumstances of Montana's and Dodd's conduct once Dodd reentered the car after he had knocked off the bank—at that point wheelman Montana then sped away (while Dodd was in the back seat stripping himself of the outer set of clothes that he had worn to commit the robbery), at the same time forcing law enforcement people in several cars to engage in a high-speed chase (up to 65 miles per hour in a residential area) until Montana's evasive tactics and high speed driving caused the car to crash into the porch of a residence and come to a stop—supported Montana's conviction on Count Two.

In the respect, the jury was instructed in connection with the Count Two bank robbery charge that one way in which the government could obtain a guilty verdict was to prove beyond a reasonable doubt that Montana was guilty of the Count One conspiracy charge, coupled with proof beyond a reasonable doubt of the several substantive elements of a bank robbery charge. That instructions was of course rendered inapplicable by the Count One acquittal. But the jury was also giving the following instructions:

> Any person who knowingly aids, abets, counsels, commands, induces or procures the commission of a

> crime is guilty of that crime. However, that person must knowingly associate with the criminal venture, participate in it, and try to make it succeed.
>
> If you then find that the government has proved beyond a reasonable doubt each of the propositions stated in the instruction regarding the Count Two charge of bank robbery, except for the reference to conspiracy in that instruction, and if you further find that the government has proved beyond a reasonable doubt that defendant acted in the manner described in this instruction with respect to James Dodd's commission of the crime of bank robbery, you may find defendant guilty of the charge in Count Two.[2]

It was certainly rational or the jury to have found each of those elements to have been proved beyond a reasonable doubt.

As for Count III, the applicable jury instruction was this:

> In Count Three, defendant is charged with knowingly using and carrying a firearm during and in relation to a crime of violence. To sustain that charge the government must prove each of the following propositions beyond a reasonable doubt:
>
> > First, that defendant is guilty of the charge of bank robbery in Count Two; and

---

[2] [Footnote by this Court] Although this Court has not been provided with a transcript of the jury instruction conference or of the in-court proceedings after this Court had so instructed the jury, its recollection is that the just-quoted instruction was not the subject of an objection. Even if it had been, however, the instruction is clearly an accurate statement of the law of aiding and abetting a criminal offense.

> Second, that James Dodd knowingly used or carried a handgun during and in relation to the bank robbery.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find defendant guilty of Count Three.
>
> If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find defendant not guilty of Count Three.

In light of what has just been said as to Count Two, coupled with the uncontroverted testimony that Dodd knowingly used a handgun during the bank robbery, Montana's conviction on that count is equally impregnable to attack.

Motions for New Trial

Trial attorney Galvan also filed a Rule 33 motion for new trial on the same grounds that were later asserted and amplified by Turner (Galvan had also added the general proposition that denial of the motion "would result in a miscarriage of justice"). Because the later Turner motion elaborated on the same grounds that Galvan had advanced, this opinion will focus on the reasons set out in Turner's supplemental motion for new trial.

First, that motion complains about the fact that Galvan's calling Dodd as a defense witness, which it will be remembered provided the only evidence—by reporting

Montana's asserted statements that rejected any involvement in Dodd's repeated statements of intent to rob a bank—that potentially separated Montana from Dodd's advance planning of the bank robbery, exposed Montana's prior criminal record to the jury because of the operation of Fed. R. Evid. 806. According to attorney Turner, that demonstrates inadequate representation on the part of trial attorney Galvan.[3] But on objective scrutiny, that contention cannot be viewed as supporting a new trial.

This Court need not decide whether, as Turner contends, trial attorney Galvan was unwittingly ensnared in the manner that is described succinctly in 5 Jack Weinstein & Margaret Berger, *Weinstein's Federal Evidence* Sec. 806.04 [2] [b], at 806-11 to 806-12 (Joseph McLaughlin ed., 2d ed. 1998):

> Rule 806 can set a trap for criminal defense counsel. A defendant who chooses not to testify but who succeeds in getting his or her own exculpatory statements into evidence runs the risk of having those statements impeached by felony convictions.

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[3] After this opinion had been dictated and while it was being transcribed, Turner brought to this Court's attention—by submitting a Citation of Additional Authority—the recent state court decision in *People v. Valentine*, No. 1-96-1946 (Ill. App. 1st Dist. Aug. 31, 1998). *Valentine* dealt with a defense counsel who, by eliciting direct testimony from his client that the had assertedly not been arrested on any charge involving violence, opened the door to impeachment by a showing of prior arrests for unrelated battery charges. Just reading the *Valentine* opinion shows that it does not bear at all on the wholly nonparallel situation presented here.

Quite apart from any considerations involved in addressing such a Monday morning quarterback type of argument, which seeks to second guess the conduct of trial counsel on the firing line, Turner has himself unwittingly provided what may be the best evidence that any possible misjudgment in that respect did not prejudice Montana.[4]

As the predicate for Turner's argument that Montana was prejudiced by Galvan's claimed slip (which Turner said "allow[ed] the government to produce before the jury devastating information regarding defendant Montana's criminal history"). Supp. Motion at 2 states:

> This information regarding defendant Montana's criminal history was elicited in a trial where the evidence against defendant Montana could not be classified as overwhelming. The fact that the evidence was not overwhelming is demonstrated by the jury's contradictory verdict.

But it must be remembered that Montana's criminal convictions became permissible impeachment (see, e.g., *United States v. Noble*, 754 F.2d 1324, 1331 (7th Cir. 1985)) specifically because Dodd testified to the asserted repeated statements by Montana (which were hearsay because offered for their truth) that Montana wanted nothing to do with Dodd's earlier-announced plans to rob the bank and that Dodd should not proceed with those

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[4] This Court should not be misunderstood as suggesting that a single mistake by Galvan—even if it was that—would support a claim of inadequate representation by counsel. To the contrary, this Court's observation of the entire trial confirms that Galvan did a highly competent job as Montana's lawyer—not the least for the reasons next discussed in the text.

plans himself. Dodd's further testimony described the circumstances that assertedly led to Montana's driving the car that morning—testimony that would have had little force were it not for the just-described exculpatory statements ascribed to Montana. On that score the proof of the pudding is in the eating:

> 1. Those hearsay statements plainly had to have the controlling direct impact on the jury's acquittal of Montana on the Count One conspiracy charge. Without those statements the jury really had no material evidentiary basis for separating the two defendants in that respect.
>
> 2. It cannot be gainsaid that the knowledge of Montana's criminal record obviously did *not* stop the jury from reaching that Count One acquittal. That, coupled with the jury's demonstrated ability to consider the three counts separately as it was instructed to do by this Court, effectively torpedoes any notion of prejudice—let alone unfair prejudice—that could arguably have stemmed from the disclosure of Montana's prior criminal record.

What if Galvan had not called Dodd to the stand to offer those assertedly exculpatory statements by Montana? In that event, the only other way in which the same information about Montana's claimed repeated rejections of any involvements in Dodd's admitted intention to carry out the bank robbery could have been placed before the jury would have been through calling Montana himself to the stand. And of course *that* course of action would have provided the jury more detailed and at least equally damaging information as to Montana's prior criminal record (certainly on cross-examination, if the matter was not indeed fronted on direct examination

in an effort to blunt its force). Moreover, it would seem that a jury might more readily credit the testimony of a codefendant who has admitted his own guilt but who gives a clean bill of health to the alleged coconspirator on trial than the jury would tend to credit the unsupported self-serving statements of a testifying defendant himself.

As the next line of attack on trial counsel Galvan, Turner unfairly criticized Galvan on the ground that the latter had (admittedly in all innocence) conveyed a note from Dodd to Montana's mother. That represents the least defensible kind of post-hoc analysis—when Galvan was asked to transmit the note there was nothing whatever to suggest anything suspicious in that respect (Dodd was also a friend of Montana's parents), let alone any knowledge of the possibility that what was involved was an effort by Montana to sell his exculpatory testimony for a price.

Finally, the supplemental motion attacks the handling at trial of information that was learned only after the government had rested its case, when Deputy United States Marshal John Jaehnig testified that while he was transporting Dodd back to the lockup after the latter had entered his change of plea, the Deputy heard Dodd tell Montana that he would testify for Montana and, as the Marshal testified, said:

> Let him know it's going to be $10,000.00 and he had said let—either: let your father know or let him know that it's going to be $10,000.00.

Under those circumstances, it was entirely proper to put that evidence before the jury in the limited manner that this Court allowed. Nothing in Turner's submission in that respect calls for the granting of a new trial either.

Conclusion

Both the motion for a judgment of acquittal and the two motion for a new trial are without merit. As stated earlier, all are denied.

Milton I. Shadur
Senior United States District Judge

Date: September 4, 1998

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 99-1691

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARWIN MONTANA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 CR 54—**Milton I. Shadur,** *Judge.*

ARGUED OCTOBER 29, 1999—DECIDED DECEMBER 16, 1999

Before POSNER, *Chief Judge,* and FLAUM and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* The defendant was convicted of bank robbery and related offenses and given a very long sentence—almost 30 years. James Dodd committed the actual robbery; Montana drove the getaway car. Dodd pleaded guilty, and testified at Montana's trial, as Montana's witness, that Montana had not known that Dodd was planning to rob the bank. Shortly before the end of the trial, Dodd gave Montana's lawyer a note for Montana's mother, who after she read it told the lawyer that the note demanded money in exchange for Dodd's having

testified favorably to Montana. The following morning, a deputy U.S. marshal heard Dodd tell Montana to tell Montana's father that "it's going to be $10,000" for the favorable testimony. The district judge allowed the marshal to testify to what he had heard. He also permitted the jury to learn that Dodd had passed a note to Montana's mother, but not that Montana's lawyer had been the courier.

Montana complains primarily about his lawyer's having passed the note from Dodd, which he says made the lawyer's representation of him incompetent, and about the marshal's being permitted to testify to Dodd's out-of-court statement, which he claims was inadmissible hearsay. The note has a twofold significance so far as the adequacy of Montana's representation was concerned. First, had the jury learned that Montana's lawyer had conveyed a demand for a bribe, it might have inferred that the lawyer was complicit in the demand, and this would have totally discredited him in the jurors' eyes. This danger was averted by the judge's refusal to allow the jury to discover the lawyer's role in the passing of the note. Second, however, the lawyer's discovery that he had been the instrument for conveying a bribe demand might conceivably have intimidated him into providing less than vigorous representation for Montana, fearing that if he were too effective the government would retaliate by accusing him of being complicit in the bribe demand, that is, of knowing what was in the note. In so arguing Montana is appealing to a line of cases which hold that a lawyer who is under investigation by the Department of Justice has a conflict of interest in representing a person whom the Department is prosecuting if the lawyer is afraid of retaliation should he press his client's defense too vigorously. *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992); cf. *United States v. Levy*, 25 F.3d 146, 156 (2d Cir. 1994); *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984).

The mere fact of being under investigation by the prosecutors of the lawyer's client does not create a fatal conflict, we have held, *United States v. Hubbard*, 22 F.3d 1410, 1418 (7th Cir. 1994); *Thompkins v. Cohen, supra*, 965 F.2d at 332; *Cerro v. United States*, 872 F.2d 780, 785-86 (7th Cir. 1989), though the Eleventh Circuit appears to differ. See *United States v. McLain*, 823 F.2d 1457, 1464 (11th Cir. 1987) (acknowledged, on other grounds, as defunct, in *United States v. Watson*, 866 F.2d 381, 385 n. 3 (11th Cir. 1989)). An actual fear of retaliation must be shown. See *Thompkins v. Cohen, supra*, 965 F.2d at 332. It was not shown here and anyway Montana's lawyer was not under investigation. He *may* have feared that he would be investigated if he didn't pull his punches, but this is pure speculation which Montana has made no effort to substantiate. There is not only no indication that the lawyer pulled his punches; there is no hint that anyone suspected him of having read the note before transmitting it to Montana's mother. It may seem, may indeed be, irregular for a lawyer to be conveying a message from a jailhouse inmate not his client to his client's mother, since prisons rightly insist on inspecting ongoing mail that is not privileged. But remember that Dodd was a friendly witness, whose testimony had sought to exonerate Montana. It was natural though inappropriate and quite possibly improper for Montana's lawyer to want to accommodate Dodd to the extent of carrying a note from him. He had no reason to believe that the note was a demand for a bribe, and so far as appears he was not in jeopardy of being prosecuted for having passed the note. As in *Stoia v. United States*, 109 F.3d 392, 395 (7th Cir. 1997), there is no basis for an inference that he was intimidated by a threat of prosecution if he didn't pull his punches in defending his client.

Montana also complains about his lawyer's decision to call Dodd as a witness, for he proved to be uncontrollable and while attempting to exonerate Montana made various

inculpatory statements. He also repeated statements that Montana had made to him, and this opened the door for the government to impeach the out-of-court declarant (Montana) with his extensive criminal record. *United States v. Stefonek*, 179 F.3d 1030, 1036 (7th Cir. 1999); *United States v. Robinson*, 783 F.2d 64, 67 (7th Cir. 1986); *United States v. Moody*, 903 F.2d 321, 328 (5th Cir. 1990). But to criticize Montana's lawyer for calling Dodd is rank Monday morning quarterbacking. Dodd was the only witness Montana had, and he tried to exonerate him. Had Montana's lawyer failed to call Dodd, Montana would have a stronger case of ineffective assistance of counsel than he has. Dodd's testimony actually helped Montana, at least a little, for the jury acquitted him of the charge of having conspired with Dodd to rob the bank.

The only other issue that requires discussion (Montana's challenge to the sentence has no possible merit) is the admissibility of the marshal's testimony that Dodd had told Montana that the price of Dodd's favorable testimony was $10,000. The government argues that it was admissible as a "verbal act," see, e.g., *United States v. Thomas*, 86 F.3d 647, 653 n. 12 (7th Cir. 1996); *United States v. Robinzine*, 80 F.3d 246, 252 (7th Cir. 1996); *Twin City Fire Ins. Co. v. Country Mutual Ins. Co.*, 23 F.3d 1175, 1182 (7th Cir. 1994); *United States v. Murphy*, No. 98-2035, 1999 WL 756846, at *3-*4 (1st Cir. Sept. 30, 1999); *United States v. Roach*, 164 F.3d 403, 410 (8th Cir. 1998), thus echoing the linguist's distinction between performative and illocutionary utterances. The latter narrate, describe, or otherwise convey information, and so are judged by their truth value (information is useful only if true—indeed is *information* only if it is true); the former—illustrated by a promise, offer, or demand—commit the speaker to a course of action. Performative utterances are not within the scope of the hearsay rule, because they do not make any truth claims. Had the marshal overheard Dodd tell Montana, "your father has promised me $10,000," Dodd's

overheard statement would have been hearsay, because its value as evidence would have depended on its being truthful, that is, on such a promise having actually been made. But what in fact was overheard was merely a demand—in effect, "give me $10,000"—and so the only issue of credibility was whether the marshal was reporting the demand correctly, and *his* testimony was not hearsay.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "C"

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 18, 2000

Before

Hon. Richard A. Posner, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Diane P. Wood, Circuit Judge

No. 99-1691

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DARWIN MONTANA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 CR 54—Milton I. Shadur, Judge.

ORDER

On December 30, 1999, plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judge has requested a vote on the petition for rehearing en banc. The petition is therefore **DENIED.**